77-1186

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

TEXAS OPTOMETRIC ASSOCIATION, INC.
Appellant

V.

DR. N. JAY ROGERS, et al
Appellees

ON APPEAL FROM A THREE-JUDGE COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT TEXAS OPTOMETRIC ASSOCIATION, INC.

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February 20, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

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DR. E. RICHARD FRIEDMAN, et al

Appellants

V.

DR. N. JAY ROGERS, et al

Appellees

JURISDICTIONAL STATEMENT OF APPELLANT TEXAS OPTOMETRIC ASSOCIATION, INC.

Preface

The Texas Optometric Association is a professional association of about 500 optometrists licensed in Texas. TOA was given leave to intervene as a defendant in the lower court and is one of the appellants herein.[1] This ap-

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[1] The remaining Appellants are Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, and Dr. Sal Mora, who are members of the Texas Optometry Board.

peal is taken from a final judgment entered October 27, 1977 by a three-judge court for the Eastern District of Texas, Beaumont Division. In the trial court, as well as in this Honorable Court, TOA supports the position of the Texas Attorney General in asserting the constitutionality of Section 5.13(d) of the Texas Optometry Act, which prohibits the practice of optometry under an assumed name or trade name.

Citation to Opinion Below

The lower court opinion is reported at 438 F.Supp 428. A copy of the lower court's Final Judgment and Memorandum Opinion in support thereof is attached to the appendix of the Appellants' brief filed by the Texas Attorney General.

Jurisdiction

This suit was originally brought by Dr. Rogers, et al, to challenge the constitutionality of Article 4552, §5.13(d) of the Revised Civil Statutes of Texas. The suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, §2281, et seq. A Memorandum Opinion was entered by the three-judge court on September 12, 1977 and a Final Judgment was entered pursuant thereto on October 27, 1977, declaring §5.13(d) unconstitutional and enjoining its enforcement. Appellant TOA filed and entered a notice of appeal on December 22, 1977. The direct appeal to this Honorable Court from the three-judge court is under authority of 28 U.S.C. §1253 and §2101(b).

The Statute Involved

The statute that has been declared by the lower court

to be unconstitutional is Section 5.13(d) of Article 4552 of the Revised Civil Statutes of Texas:

> (d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership or optometrists by whom they are employed.

Statement of the Question Presented

Whether the Texas statutory prohibition against practicing optometry under an assumed name or trade name is a violation of the First Amendment.

Statement of the Case

The statement of the case, including the facts and procedural history of this case, has been set forth in detail in the brief filed by the Texas Attorney General for Appellants Dr. E. Richard Friedman, et al, and will not be covered again in the interest of the Court's time. Appellees Dr. N. Jay Rogers, et al, have given notice of their intent to cross-appeal from a portion of the trial court's judgment; and in the event of such cross-appeal,

TOA will file a separate reply brief to the issue or issues raised therein.

National Significance of the Case

This case is particularly significant because it presents questions of the outer limits of the *Bates* and *Virginia Pharmacy* cases, *infra,* to wit: Whether the rationale of those cases should legalize an illegal activity under the theory that advertising of the illegal activity would otherwise be suppressed. Furthermore, this case will have the effect of clarifying the constitutionally permissible restraints on deceptive or misleading advertising.

Argument and Authorities

THE TEXAS STATUTORY PROHIBITION AGAINST PRACTICING OPTOMETRY UNDER AN ASSUMED NAME OR TRADE NAME IS NOT AN UNCONSTITUTIONAL RESTRAINT OF FREE SPEECH.

A. *The Texas statute.* In 1969 the Texas legislature codified what had theretofore been known as the "professional responsibility" rule of the Texas Optometry Board. The thrust of the professional responsibility rule was to focus professional responsibility on the doctor and place his reputation and his competence in the forefront, which in turn would be a safeguard for the patient. The Professional Responsibility Rule was originally adopted by the Optometry Board in 1959, ten years before the enactment of the statute.

The Texas optometry statute in question was codified as Art. 4552, §5.13(d) of the Revised Civil Statutes of

Texas and it reads as follows:

> "Section 5.13. Professional Responsibility. (a) The provisions of this section are adopted in order to protect the public in the practice of optometry, *better enable members of the public to fix professional responsibility*, and further *safeguard the doctor-patient relationship.*
>
> ***
>
> (d) *No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas*; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership or optometrists by whom they are employed." (emphasis supplied)

B. *The lower court's memorandum opinion.* A three-judge court below declared this section of the optometry statute "unconstitutional under the First Amendment of the United States Constitution," citing *Bates v. State of Arizona*, ____ U.S. ____, 97 S.Ct. 2691, 52 L.Ed 2d ____ (U.S. June 1977), and *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976). From this decision, Appellant Texas Optometric Association appeals.

In effect, the lower court held that the First Amendment creates *a constitutional right to practice a profes-*

sion under an assumed name. Appellant respectfully urges that there is no such constitutional right implicit in the constitutional right to advertise.

In its memorandum opinion, the lower court held that, in the light of the *Bates* decision, the public's interest in a free flow of commercial information is sufficiently strong to outweigh any other public interests that might justify the requirement that an optometrist practice under his own name. The court did not analyze the competing public interests involved in such a statute, but generally deferred to the *Bates* decision as having finally settled such matters. (Memorandum Opinion, pages 2-4)

In its opinion, the lower court attempted to characterize the use of a trade name and the use of advertising as synonymous. The court reasoned that "a trade name is encompassed within the meaning of advertising" because "eventually the name itself calls public attention to the product." (Memorandum Opinion, page 4). Therefore, the court concluded that the use of trade names is protected in the same way advertising is protected.

Appellant TOA respectfully disagrees. Section 5.13(d) provides that an optometrist must practice under his own name and not an assumed name. It does not prohibit him from advertising in general. The fact that an optometrist must practice under his own name and not under a fabricated name has no effect on his freedom to advertise the availability or the price of his services. The most significant effect §5.13(d) might have on advertising is that it would require an advertising optometrist to reveal his true identity to the public.

Even the lower court seemed to have some misgivings about its attempt to classify assumed name practice as

"advertising." The court stated "even if a trade name is not an integral part of advertising per se, there is a first amendment right to the use of a trade name as part of the consuming public's right to valuable information . . . Accordingly, this court, applying the rationale of the advertising cases to the trade name question [holds §5.13(d) unconstitutional]." (Memorandum Opinion, page 4).

It is ironic that the *Bates* case, which strengthened the consumer's "right to know" and which specifically recognized the need for protection from misleading and deceptive statements, would be used as the rationale for striking down a law requiring an optometrist to practice out in the open, under his own name. The lower court uses the "consumer's right to know" as a justification for striking a statute which requires full disclosure of an optometrist's identity. The court may have alluded to "the rationale of the *Bates* case," but it did not apply the reasoning of *Bates*. Otherwise, it would have determined that §5.13(d) was clearly permissible.

C. *The "Rationale of the Bates Case"*. In *Bates*, this Court held that commercial speech is protected by the First Amendment, though it is not as stringently protected as non-commercial free speech. Generally, in deciding First Amendment free speech questions, the function of the judiciary is to balance the competing interests, weighing (1) the purported justifications for the restriction, and (2) the harms resulting from the restriction. See generally *Konigsberg v. State Bar* 366 U.S. 36 (1961), and *Virginia Pharmacy Board v. Virginia Consumer Council* 425 U.S. 748 (1976). According to *Bates*, in the areas of commercial free speech, the balancing test

is also used, but the Court will permit greater restrictions upon commercial speech than it will allow on non-commercial speech. In fact, this Honorable Court specifically alluded to certain restrictions that will be permitted.

> "In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, *we, of course, do not hold that advertising by attorneys may not be regulated in any way*. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.
>
> "Advertising that is false, deceptive, or misleading, of course, is subject to restraint . . . *the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena*." (*Bates* at page 31, emphasis supplied).

Sections §5.13(d) was created as a protection to the public, to keep them from being misled, and to provide them with full information about the identity of the person performing health care services. Contrary to the opinion of the lower court, the *Bates* decision does not mandate that §5.13(d) is unconstitutional. Instead, *Bates* actually recognizes the need for laws such as §5.13(d) which insure that the public is as fully informed as possible.

D. *Analysis of the "Professional Responsibilty" statute*. The only ground on which the lower court held §5.13(d) invalid was that it violated the First Amendment's guarantee of a right to free speech. Therefore, it is

necessary that §5.13(d) be analyzed in terms of its infringement upon that First Amendment guarantee.

1. *Does §5.13(d) raise a free speech question?* In a technical sense, any law which prohibits or requires an activity is an infringement of freedom of speech. Our freedom to do or say the opposite is impaired. But very few of such infringements are constitutionally impermissible. Section 5.13(d) requires that an optometrist practice in his own name. To the extent that it requires him to tell the public his true identity, §5.13(d) does infringe on an optometrist's right to free speech. But this law infringes upon a person's right to free speech in much the same way the law against perjury does. The individual is limited in what he may say. What he says must be truthful.

Section §5.13(d) does not prohibit an optometrist from advertising or otherwise getting the message to the public that he has services to render. It merely requires that in any statements to the public, he must be truthful and he must disclose who he actually is. He cannot hide behind an assumed name. Such a requirement does not even pass the threshold of raising a significant restriction on free speech.

We would have a different case entirely if the Texas legislature had in effect said: "Optometrists can practice under and use an assumed name . . . but they cannot advertise that fact." Instead, the legislature concluded that in the patient's best interest, all optometrists in the state (whether they choose to advertise or not) must practice with their personal name "up front" and cannot hide behind, practice under, or use an assumed name or trade

name. The legislature manifested an intent to fix professional responsibility on the examining doctor and to focus on this identity for the protection of the patient.

Section 5.13(d) is not an impermissible restriction on commercial free speech. Although it may technically put a limit on what may be said, the limitation is with good justification. The requirement that an optometrist practice under his own name is no more a limitation on commercial free speech than is the law which prohibits deceptive advertising or the law which requires sworn testimony to be truthful.

2. *What are the practical justifications for §5.13(d)?* Assuming the balancing test applies, any balancing of justifications versus the harms of §5.13(d) will reveal that its justifications outweigh any harms.

a. *Professional Responsibility is encouraged by §5.13(d).* The provision of §5.13 which prohibits the "assumed name practice" of optometry, is only part of an over-all professional responsibility statute which (1) prohibits fee splitting with laymen, (2) prohibits fee splitting with other optometrists, (3) prohibits gross absenteeism by the optometrist, and (4) prevents deception with regard to listing of the optometrist's name on the door, windows, directories, etc.

The over-all purpose and the interrelationship of these various professional responsibility rules was discussed extensively in the landmark Texas case of *Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. Sup. Ct., 1967) cert. denied,* 384 U.S.52 (1967). In that case, each of the various portions of the profes-

sional responsibility rule were considered and upheld as having a valid statutory purpose to avoid certain evils that had theretofore been prevalent in the optometric profession. The analysis made by the Texas Supreme Court in *Carp* is relevant to the First Amendment balancing test since it speaks to the purposes and social justifications of §5.13(d).

In addressing the assumed or trade name portion of the professional responsibility rule, the Texas Supreme Court stated the rationale and the reasons for the rule:

> "The reason for this section is that the *trade name or assumed name practice*, like fee splitting, *disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist.*"

> "The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. *The result is that the identity of the licensed practicing optometrist is hidden behind the unlicensed trade name.* Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. The practice is confusing and misleading to the public." (emphasis supplied)

The Texas Supreme Court also upheld the statutory prohibition against assumed name practice of optometry on the grounds that is prevents deceit and misrepresentation. The court gave specific examples in its opinion regarding the deceptive use of trade names. According to the facts set forth in the *Carp* case, trade names had often been used as a shield for keeping the public in relative ignorance as to what optometrists were in the

office on a day-to-day basis. Practicing optometry under trade names had de-emphasized the optometrist's individual name and his personal reputation for competency . . . or incompetency.

The justifications for a requirement that optometrists practice under their own names are many. The primary intent is to insure that the optometrist is personally responsible for the services he renders and to insure that the patient is fully informed of the identity of the optometrist examining him in advance. This enhances the relationship between the examining optometrist and his patient, and tends to lead to a better quality of professional eye care.

b. *"Up front" responsibility enhances the quality of vision care.* When there is not a strong relationship between the examining optometrist and his patient, the resulting unfamiliarity causes the optometrist to feel less responsible and less fearful of repercussion from the patient's dissatisfaction or from the doctor's poor quality of professional services. (See the deposition of Dr. Shannon filed in this case, at page 22-23). Thus in optometry, the likelihood of lower quality optometric care increases as the doctor-patient relationship deteriorates.

If the optometrist gains his patients through the anonymity of trade name advertising, then the need to maintain a high personal reputation for competence and the need for high professional standards is diminished (Dr. Shannon, page 125). If the optometrist who practices under a trade name is negligent or performs his professional services poorly, it is doubtful that he will have any serious repercussions from that patient's

dissatisfaction (Dr. Shannon, page 30). The patient is simply replaced by more advertising of the trade name (Dr. Shannon, page 13-15) or if the situation has really degenerated, the doctor could simply change the trade name under which he was practicing.

These are valid justifications for requiring a doctor of optometry to practice under his own name. The Texas legislature could justifiably conclude that an emphasis on personal accountability and personal reputation would enhance the quality of vision care.

c. *Actual experience confirms legislative concern.* Legislative concern over the dangers that assumed name practice would de-emphasize personal responsibility is shown to be justified by past experience, as related by Dr. Robert Shannon's testimony.

Dr. Shannon was the owner of an optometric chain in Texas prior to the Professional Responsibility Rule adoption. His chain stores offered both optician and optometric services before the adoption of the rule. His experience prior to the requirement that optometrists practice under their own name vividly confirms legislative fears. Here is his testimony: (Dr. Shannon's deposition, pages 20-25).

"Q. Was there a continuing personal relationship between the doctors of optometry and the patients at your local offices?

A. No. There was no — for the most part, there was no personal relationship. The patient was an individual

that had a service performed by a doctor, and as soon as that patient got out the doctor's door, another one came in. For the most part, the doctor would not recall that patient unless it was a most unusual circumstance that went along with it.

Q. You are saying, then, that the examining doctor did not know the patients by name or remember them by name?

A. That's correct.

Q. How about vice versa?

A. I would say the same. In most cases the patients were not introduced to the doctor in our offices. The patient would be told by one of the girls or one of the clerks in the office, "The doctor is ready for you. Come with me", and she in turn would take him or her into the examining room and say, "Please be seated. The doctor will be with you in just a moment."

Q. In what percentage of the new patient cases would the patient previously know the doctor by some —

A. It would be very low.

***

A. The only time a doctor would know — or the patient would know the doctor, that I can recall, is when we employed a doctor who had been located in that particular locale, and we placed him into one of our

offices located in that immediate area. This haped on very very infrequent occasions.

Q. How did the patients then come to your office?

A. Through advertising and through our locations, the attractiveness of our locations, through advertising.

Q. Contrasted to the personal reputation of the doctor of optometry?

A. Yes. I am sure that's true. We did not spend money advertising the doctor. We spent advertising money advertising ourselves, the organization, Lee Optical or whatever the name was that we advertised under.

Q. Are you then saying that the patients coming to your office were there primarily through advertising efforts rather than through the reputation of the doctor for competency?

A. Yes, I would say that on the whole ****"

Dr. Shannon's testimony confirms that, in the days before the professional responsibility rule, personal responsibility deteriorated under assumed name practices.

The doctor's tendency to become indifferent or less concerned with the patient's visual health when his personal reputation is not at stake is compounded by the pressures of overhead, volume, time and speed which often accompanies a high volume, trade name practice.

These pressures increase the likelihood of shortcutting or eliminating important aspects of the examination,

which can be very harmful to the patient's visual health (Dr. Shannon, pages 124-126).

This fact was covered in great detail in the deposition of Dr. Nelson Waldman, whose opinion was based on his service as Chairman of Texas Optometry Board and as a member of the Board's investigating committee for basic competence violations. Dr. Waldman outlined the steps in a basic competency examination in layman's terms, and he pointed out the dangers of exams done in haste or indifference (Dr. Waldman, pages 6, 7, 16-30, 75-76).

A hasty or omitted pathology examination could fail to detect serious eye diseases and even diseases of other parts of the body whose manifestations are detectable though examination of the eye's interior. These diseases include irites, cataracts, glaucoma, high blood pressure, diabetes, kidney disease, and many other serious illnesses. The failure to detect these symptoms through haste or speed could seriously jeopardize the patient's health (Dr. Waldman, pages 24-26).

There are other dangers and consequences that can often occur from incorrect and hasty examinations and refractions. It is easy to overlook muscle imbalances which can cause interference with the patient's vision, his physical comfort, and his emotional stability. Other serious consequences can flow from incorrect prescriptions or incorrectly fabricated lenses or lenses which are positioned off of the optical centers of the eye. Serious and irreparable damage can be done to the cornea of the eye if contact lenses are fitted incorrectly. Other serious consequences related to faulty prescriptions can also jeopardize the patient's health, schooling, earning capa-

city, and everyday enjoyment of life. These would include headaches, nausea, vomiting, dizziness, learning impediments, less efficient work ability, and impaired driving ability. In many cases the patient is unable to detect the relation of these problems to his eyeglasses (Dr. Waldman, pages 23-25, 26-30, 75-76, Dr. Shannon, pages 31-32).

When an optometrist gains patients by the reputation of his own name (whether advertised or not) the optometrist is more likely to adhere to high professional standards in order to keep that patient and to spread the optometrist's reputation for excellence and competence. Such an optometrist knows that the best means by which he can keep patients is through the continued reputation for excellence which attaches to his professional name. This logically nurtures higher standards of professional service.

d. *The statute requires full disclosure and truthfulness.* The prohibition against the use of assumed names or trade names in the practice of optometry is equivalent to a requirement by the State that the doctor's advertising be truthful and that it fully disclose his *real* name under which he is licensed to practice optometry. It prevents the anonymity of assumed names and trade names which, in the context of the optometric profession, can serve to mislead the public and deny them the benefits that inherently accompany disclosure . . . up front . . . of the professional with whom they will be dealing.

It is not enough to say that such disclosure can be satisfied by requiring the optometrist to hang a license or diploma in his examination room. By the time the patient reaches that point on his quest for vision care, the patient

is already in the grasp of the optometrist and has made the irrevocable decision to utilize the services of such optometrist. Similarly, even requiring that the license be displayed in the lobby or reception room is insufficient protection for the public since, as a matter of logic, once the patient has stepped into the reception room of an optometrist, the chances are overwhelming that he will stay for the examination. This is what the owners of the opticianry chains are banking on when they seek to combine the practice of optometry with their optical shops and advertise both to the public under one trade name. Under those circumstances, the identity and professionalism of the optometrist who actually provides the eye care is relegated to one of insignificance. The motivation of the optometrist for the highest quality of eye care is substantially lessened, and the patient's eye health suffers accordingly.

Section 5.13(d) has strong justifications. It encourages an optometrist to assume up-front responsibility for his action, and it prevents the abuses that can result from the anonymity of an assumed name. It further insures that the public is fully informed, in advance, of the identity of the professional person responsible for providing the health care service. The statute is designed to inform the public and to enhance quality eye care.

3. *The harms found in Bates and Virginia Pharmacy are not present.* Under a First Amendment analysis, it is necessary not only to weigh the benefits of the statute, but also to weigh the restrictions to the public's right to know which result from the purported restriction of speech.

In *Bates* and *Virginia Pharmacy,* this Court looked to determine if the law in question served to keep information from the public. The ban on advertising by lawyers and pharmacists was found to keep valuable information from the public, and the harm to the public was deemed to outweigh the benefit. But in the case at hand, §5.13(d) does not have such an effect. Instead, it requires that a full disclosure of the identity of the optometrist be made. It affirmatively requires that the public be informed of the truth. The harms present in *Bates* and *Virginia Pharmacy* are not present in this case.

In the context of the optometry profession, any information which §5.13(d) incidentally keeps from the public is *far less valuable* than the information which trade name advertising would disguise. Section 5.13(d) is intended to benefit and protect the consuming public.

Section 5.13(d) is of questionable "harm" to the plaintiff, Dr. Rogers, under the facts in this case, to-wit:

The Texas Optometry Act permits opticians (the merchants of eyeglasses, frames, etc.) to use assumed names and trade names. Since it is legal for opticians to do business under a trade name, they may advertise under such a name without restraint. (See §5.10 of the Texas Optometry Act.) Dr. Rogers' Texas State Optical offices throughout the state have for many years operated and advertised *as opticians* and may continue to do so under the Texas statutes. However, §5.13(d) would prohibit an *optometrist* from practicing optometry under the trade name "Texas State Optical" and would require the practicing optometrist to practice under his own name rather than to anonymously hide behind the facade of "TSO."

Section 5.13(d) does not result in the harms which were found to result in *Bates* and *Virginia Pharmacy*. In fact, §5.13(d) affirmatively seeks to prevent some of those harms. Furthermore, §5.13(d) has a minimal effect on the plaintiff in this case. Furthermore, the fact remains that "Texas State Optical" cannot offer optometric services because it is not and cannot be licensed to do so . . . only a Doctor of Optometry can be licensed. In the words of the Texas Supreme Court in *Carp*, "The practice of optometry under a trade name is a holding out to the public that the trade name is licensed . . . The practice is confusing and misleading to the public."

Summary. The determination by the lower court that §5.13(d) is unconstitutional under the *Bates* rationale is erroneous. A requirement that an optometrist must practice under his own name is not a violation of commercial free speech in the same way that a prohibition of advertising might be. Section §5.13(d) does not prevent an optometrist from advertising truthfully and therefore is not invalid under a *Bates* analysis. Section 5.13(d) positively encourages an up-front doctor-patient relationship, requiring the doctor to take a greater personal responsibility for the health care he provides, and consequently lessening the likelihood of lower quality eye care and indifference to the needs of the patient.

Section §5.13(d) positively requires that the public be fully informed of the identity of the attending optometrist. Section 5.13(d) is not an unconstitutional infringement of commercial free speech.

Conclusion

On the basis of the foregoing, the Texas Optometric Association respectfully urges that Article 4553, Section 5.13(d), which prohibits an optometrist from practicing under or using an assumed name, is consitutional under the First Amendment. To this extent, the Texas Optometric Association prays that this Honorable Court note probable jurisdiction of this case and that the judgment of the three-judge district court be reversed in part and rendered on the issue of the constitutionality of Section 5.13(d).

Respectfully submitted,

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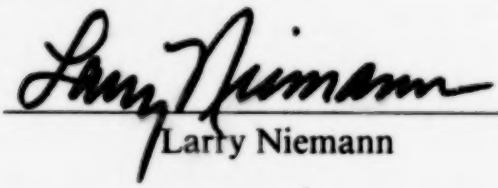
By 
Larry Niemann

Attorneys for Appellant Texas Optometric Association, Inc.

APPENDIX
TO
JURISDICTIONAL STATEMENT

APPENDIX

A copy of the Memorandum Opinion of the Three-judge Court, dated September 12, 1977 is included in the Jurisdictional Statement filed herein by the Texas Attorney General on behalf of Appellants Dr. E. Richard Friedman, et al.

A copy of the Final Judgment of the Three-judge Court, dated October 27, 1977 is included in the Jurisdictional Statement filed herein by the Texas Attorney General on behalf of Appellants Dr. E. Richard Friedman, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DR. N. JAY ROGERS,
Plaintiff,

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,
Intervenor,

VS. No. B-75-277-CA

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.
Intervenor.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Intervenor Texas Optometric Association, Inc., appeals to the Supreme Court of the United States from that portion of the final judgment entered in this action on October 27, 1977 declaring Section 5.13(d) of the Texas Optometry Act unconstitutional and enjoining the above named defendants from enforcing said provision.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

NIEMANN & NIEMANN
Attorneys at Law
1210 American Bank Tower
Austin, Texas 78701
512/474-6901

By /s/
Larry Niemann

Attorneys for Intervenor Texas
Optometric Association, Inc.

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS

By /s/
Jay F. McBride

FILED

U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

DEC. 22 1977

MURRAY L. HARRIS, CLERK

BY
DEPUTY /s/
Joy F. McBride

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, P.O. Box 12548, Austin, Texas 78711, on this the 20th day of December, 1977.

/s/
LARRY NIEMANN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant TOA's Jurisdictional Statement has been deposited in the U.S. Mail, Certified Mail, Return Receipt Requested, addressed to Robert Q. Keith, attorney for Dr. N. Jay Rogers, 1400 San Jacinto Building, Beaumont, Texas 77701, Brian R. Davis, attorney for W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas, Chapter, 408 First Federal Plaza, 200 E. 10th Street, Austin, Texas 78701, John G. Tucker, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, individually, P.O. Box 1751, Beaumont, Texas 77704, and Dorothy Prengler, Assistant Attorney General of Texas, attorney for Dr. E. Richard Friedman, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr. Dr. John W. Davis, and Dr. Sal Mora, in their official capacity as members of the Texas Optometry Board, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711, on this the 20th day of February, 1978.

Larry Niemann

LARRY NIEMANN

STATE OF TEXAS

COUNTY OF TRAVIS

Before me, the undersigned authority, appeared LARRY NIEMANN, known to be to be the person whose name is subscribed above, who after being duly sworn, stated upon oath that the information contained in the foregoing Certificate of Service is true and correct.

Sworn and subscribed to before me this the 20th day of February, 1978.

Fred Niemann

Notary Public in and for Travis County, Texas